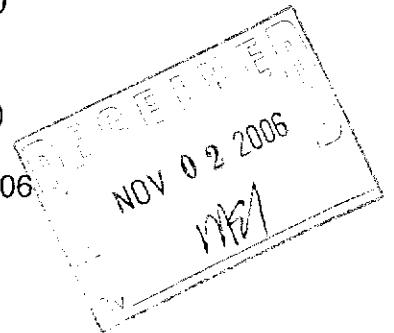


**COUNTY OF VENTURA  
ENVIRONMENTAL HEALTH DIVISION  
LOCAL ENFORCEMENT AGENCY**

INDEX OF DOCUMENTS FOR  
THE COMPLETE ADMINISTRATIVE RECORD  
OF THE ADMINISTRATIVE HEARING  
FOR APPEAL OF  
THE LOCAL ENFORCEMENT AGENCY (LEA)  
CEASE AND DESIST ORDER  
ISSUED TO WAYNE FISHBACK ON MAY 11, 2006



**DOCUMENTS:**

1. Appellant's May 26, 2006 request for hearing to appeal Cease and Desist Order
2. LEA's June 6, 2006 Response to Appeal filed by appellant
3. Appellant's July 18, 2006 Hearing Brief and Exhibits
4. LEA's August 29, 2006 Reply Brief to the July 18, 2006 Appellant's Brief
5. LEA Exhibits submitted to the Hearing Officer at the July 20, 2006 appeal hearing
6. Compilation of closing briefs:
  - a. Appellant's Closing Brief, September 18, 2006
  - b. LEA's Final Closing Brief, September 18, 2006
  - c. Hearing Officer NOTICE OF DECISION, September 22, 2006
7. Hearing Transcripts:
  - a. June 21, 2006 Hearing
  - b. July 20, 2006 Hearing
  - c. August 31, 2006 Hearing

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SEP 19 2006

In re:	)	APPELLANT'S CLOSING BRIEF
	)	
WAYNE FISHBACK,	)	
	)	Hearing Dates:
Appellant,	)	July 20, 2006
	)	August 31, 2006
	)	
	)	

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#### I. Summary of Reply

As we discussed during the hearing, the key question in this matter is whether the material utilized in the erosion control and hillside stabilization work is "solid waste." The EHD relies on the definition in Public Resources Code §40191. The Fishbacks rely on a Supreme Court case, two of the waste industry's most well-recognized experts, and hundreds of pages of evidence presented at the time of hearing.

There was no evidence presented by the EHD. Instead, the division relies exclusively on the sole premise that if a person buries something on their property, and that "something" is on the list in §40191, then the project is governed by the EHD and a permit is required. This is not the intent of the Integrated Waste Management Act, does not comport with the Supreme Court's interpretation of §40191, and is inherently unfair. In fact, the basic problem with the EHD's position is that it is not logical. Why would the state create a statutory scheme promoting reuse, calling out source separated materials for incorporation into other projects to avoid landfilling, only to have every use of such materials be deemed "solid waste"?

The example used by Kelly Astor during the hearing is most telling: if a load of concrete comes to the front gate of a landfill, it can be "solid waste" depending on what happens to it. If it goes into the landfill site, it is solid waste. If it utilized in erosion control work, levees or as road base, it is reuse material.

What the Fishbacks have done is to utilize source separated, reuse materials in a project that was exempt from regulation under the Integrated Waste Management Act, and the County's Hillside Erosion Control Ordinance. Further, the law requires the Fishbacks to prevent or repair erosion of the Fishback land into adjacent properties and water courses.

## **II. Evidence Presented At The Hearing.**

The EHD did not present any evidence during the hearing, other than the testimony of Mr. Mionski, which will be discussed in a moment. In contrast, the Fishbacks provided numerous exhibits, dozens of sworn statements, soil testing reports, and the testimony of several expert witnesses to show that the project was fully within the parameters of the law. During the first hearing, the Fishbacks offered into evidence the exhibits in the binder presented to the hearing officer. These were accepted without objection by the EHD. Some of these exhibits are of particular note.

At Tab 1 is the HECO Plan. It was approved on May 9, 2006, prior to the issuance of the Cease and Desist order. Final sign-offs occurred in June of 2006. During the hearing, Mr. Stratton said that the Fishbacks provided no evidence that their project was allowed. In the HECO plan itself, at page 3 of Chapter I, the RCD notes that erosion work completed by the Fishbacks was exempt from regulation under the HECO, which was corroborated by the testimony of both Mr. Fishback and Phil Sherman, the project's Civil Engineer.

There are several letters from RCD in the binder (Tab 3 and Tab 15), in which RCD is arguing with EHD that their procedures are actually more stringent than those of the EHD.

At Tab 9, there are literally dozens of declarations from the persons who hauled material

to the Fishback Ranch, and all of them admitted that the materials submitted were “clean fill” as that term is used in the regulations: clean concrete, dirt, brick, stucco, and fully cured asphalt. Mr. Stratton contends in the disputed “Reply Brief” (submitted the day before the August 31<sup>st</sup> hearing) that Mr. Fishback has “admitted” to using fiberglass, asphalt shingles and other materials in the erosion control work. This is false. The hearing officer should note that Mr. Stratton fails to cite any testimony, any letter, any exhibit in which such an “admission” is made. It is not true and cannot be proven as true.

The EHD does not understand or refuses to admit the interplay between the diversion goals of the state and the enforcement goals. As noted in the factual summary in the Opening Brief and in testimony presented by Mr. Fishback at the first hearing, Mr. Fishback spoke to many County employees during 2005, including Public Works, the RCD, the EERD and Planning. No one told him he needed any type of permit. The RCD said he was exempt. EERD gave him a packet of materials, encouraging the use of reuse materials (Tab 16). The Integrated Waste Management Board’s website specifically calls out reuse materials as an excellent way to divert materials from the waste stream, to lower construction costs, and to benefit the environment (see pages 3 to 6 at Tab 12).

At the very beginning of the first hearing, the Fishbacks asked to bring in the soil reports that were being done on the ranch. EHD said it wasn’t relevant, as both parties agreed that only “clean fill” was being used at the ranch. No one – other than Robert Mionski – claims to have seen anything other than clean fill at the ranch. Numerous County and state employees have toured the property; only Mionski claims to have seen non-inert materials at the ranch. The hearing officer is reminded that Mionski claimed to know every rock on the Fishback property, that millions of dollars was paid to Fishback, and that Mionski climbed into the back of the trucks to the Fishback property. His testimony is inherently unreliable.

Thus, the evidence shows that only clean fill was delivered to the ranch; it was utilized in the construction of engineered erosion control and bank stabilization work, and the work was

exempt from regulation under the HECO. Until EHD's involvement in 2006, no one else at the County believed the site was regulated. While a grading violation was issued in 2005, it was lifted after an investigation by Public Works. As noted in the regulations (§17380(g)), **"This article does not apply to persons who generate C&D [construction and demolition] debris or inert debris in the course of carrying out construction, remodeling, repair, demolition or deconstruction of buildings, roads and other structures, (collectively, 'construction work') at the site of the construction work or to persons who own the land, buildings and other structures that are the object of the construction work . . ."**<sup>1</sup>

The Fishbacks' project utilizes reuse materials in a work of construction. Their work is not regulated by the EHD, and material used is not "solid waste" as envisioned by the Integrated Waste Management Act.

### **III. The Testimony of George Eowan and Kelly Astor**

The hearing officer is encouraged to re-read the testimony of these two experts in the transcript that we hope will be completed in time for the decision. It is interesting that EHD objected strongly not only to the testimony of these two men, both of whom are experts in the field of waste management, but even to consideration of the Integrated Waste Management Board's website. The Eowan and Astor testimony provided a statewide perspective on waste management, rather than the limited focus of the EHD. A summary of the salient points of their testimony follows.

Mr. Eowan testified that he assisted in the drafting of both AB 939 and the regulations which accompany it. He ran the Integrated Waste Management Agency for the five critical years of the transition between the "old" way of managing waste – landfilling – and the new policy of reuse and recycling, with landfilling a last resort. Since then, he has assisted numerous

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<sup>1</sup>The full text of 17380(g) is at page 11 of the Fishbacks' Opening Brief

jurisdictions in the drafting of their waste management plans and continues to work closely with the current Waste Board and staff.

The new policy is aimed at a “Zero Waste California,” with the Waste Board doing everything possible to encourage the utilization of C&D materials (of which inert debris is a subset) in order to achieve that primary goal. State law mandates the diversion of such materials from landfills, and utilization of these materials in construction projects is strongly encouraged (further, Ventura County Ordinance 4308 imposes a local requirement of diversion and reuse).

Mr. Eowan testified that he has toured the Fishback ranch, and if the project utilizes clean fill – which both sides agree is the case – then this project is exempt from regulation by the EHD.

Mr. Astor has also been involved in the waste business for decades. He is general counsel to numerous waste industry trade associations, and waste haulers, and has an intimate knowledge of how the industry operates. He too was involved in the drafting of AB 939, and has participated in numerous legislative adjustments since enactment of the original bill.

In his expert opinion, the Supreme Court’s decision in *Waste Management Inc. v. Palm Springs Recycling Center* (1994) 7 Cal. 4<sup>th</sup> 478 provides excellent guidance in this matter. Just because an item is listed in §40191 does not mean that such an item is “solid waste,” which is the primary contention of the EHD. A determination of whether something is waste is keyed to its eventual use. According to Mr. Astor, use of inert materials in a construction like what is being done on the Fishback ranch is definitely exempt from regulation under the Integrated Waste Management Act.

Both of these men, experts in this area, focused on the overarching policy of the state towards diversion and reuse. The EHD has focused solely on a single definitional section which – pursuant to the Supreme Court in the *Palm Springs Recycling* case – does not apply. The Fishback operation is exempt from regulation by the EHD.

## **V. The Fishbacks Have Been Singled Out For Disparate Treatment**

The hearing officer is referred to the last section of the Fishbacks' Opening Brief concerning the singling out of the Fishbacks for unfair treatment. As can be seen by reviewing the letters of the County at Tab 17, the County has imposed conditions (public hearing and EIR requirements) on the Fishbacks that have not been imposed upon similar projects, or even upon projects which use combustible or putrescible materials, materials not present at the Fishback Ranch.

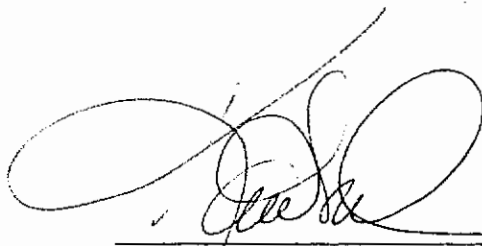
The Fishbacks are using inert materials only for erosion control. They are not operating a "dump" for "solid waste." The EHD's actions in insisting on compliance with inapplicable laws is unjust, especially when EHD is not imposing such requirements on other agricultural operations.

## **VI. Conclusion**

This case involves the conflict between statewide policy and a local agency that is trained to see only one thing: waste. State policy and the Supreme Court have made it clear that an item is not waste unless it is discarded. If an item is diverted for reuse, it never becomes solid waste.

The Fishbacks are not regulated by EHD. The work they are doing is erosion control, and is governed by agricultural grading ordinances, but not by solid waste laws. This appeal should be upheld.

Dated: September 18, 2006

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KATE M. NEISWENDER, Attorney for  
Appellant WAYNE FISHBACK

**PROOF OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF VENTURA**

I am employed in the County of Ventura, state of California. I am over the age of eighteen, and not a party to the within entitled action. My business address is Post Office Box 24617, Ventura, California 93002.

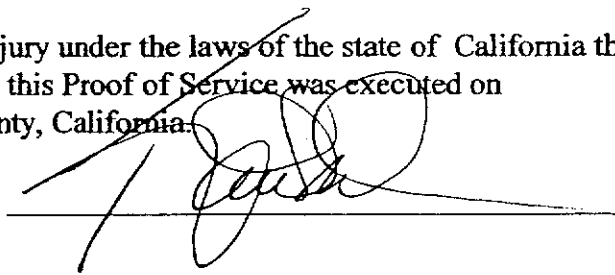
On September 18, 2006, I served the foregoing document described as **APPELLANT'S CLOSING BRIEF** placing a true copy thereof, enclosed in a sealed envelope, addressed as follows:

**For the Hearing Officer** — *HAND-DELIVERED*  
Jim Delperdang, Hearing Officer  
Weights and Measures  
County of Ventura  
800 So. Victoria Ave.  
Ventura CA 93009

**For EHD**  
William Stratton  
Technical Services Section  
Environmental Health Division  
800 So. Victoria Ave.  
Ventura, California 93009

I am readily familiar with our office's practice for collection and processing of correspondence and other materials for mailing with the United States Postal Service. On this date, I sealed the envelope(s) containing the above materials and placed the envelope(s) for collection and mailing on this date at the address stated above, following our office's ordinary business practices. The envelope(s) will be deposited with the U.S. Postal Service on this date, in the ordinary course of business.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct and that this Proof of Service was executed on September 18, 2006 at Ventura County, California.





RESOURCE MANAGEMENT AGENCY  
ENVIRONMENTAL HEALTH DIVISION

MEMORANDUM

DATE: September 18, 2006

TO: Jim Delperdang, LEA Hearing Officer

FROM: William C. Stratton, LEA *WS*

SUBJECT: FINAL CLOSING BRIEF FROM THE ENVIRONMENTAL  
HEALTH DIVISION CONCERNING ISSUANCE OF CEASE  
AND DESIST ORDER TO WAYNE FISHBACK

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Attached is the Environmental Health Division (EHD) Closing Brief concerning the administrative hearing for an appeal of the Cease and Desist Order issued by the EHD to Mr. Wayne Fishback.

Please accept this Closing Brief in conjunction with the Response to the Statement of Issues, and the Reply Brief previously submitted by the EHD to the Hearing Officer.

Attachment

c: Robert Gallagher (w/ Attachment)

**VENTURA COUNTY ENVIRONMENTAL HEALTH DIVISION  
LOCAL ENFORCEMENT AGENCY  
CLOSING BRIEF  
CEASE AND DESIST ORDER ISSUED TO  
WAYNE FISHBACK  
SEPTEMBER 18, 2006**

The Ventura County Environmental Health Division's (EHD) cease and desist order against Wayne Fishback should be upheld. Between February 2004 and May 11, 2006, the date of the cease and desist order, Mr. Fishback disposed solid waste on his property without a solid waste facility permit. The California Public Resources Code Section 44002, states that no person shall operate a solid waste facility without a solid waste facilities permit. Mr. Fishback failed to obtain the required permit, and EHD was required by state law to issue the cease and desist order.

EHD has already submitted arguments and described the legal authority of the Local Enforcement Agency (LEA) at the administrative hearing, in written response to Mr. Fishback's statement of issues and in the reply brief submitted to the hearing officer on August 29, 2006. For the sake of brevity, EHD will not repeat those arguments here, but instead will address and clarify a few outstanding issues and address the oral remarks made by Mr. Fishback's representatives during the final day of hearing (August 31, 2006). This closing brief should be read in conjunction with the EHD official response to the statement of issues dated June 6, 2006, and the EHD reply brief dated August 29, 2006.

EHD has demonstrated through testimony, declaration, and photographs that Mr. Fishback is disposing solid waste on his properties without the required permit. The real issues in this case are very simple and straightforward. Mr. Fishback is accepting construction and demolition debris, as well as inert debris (collectively referred to as CDI) on his properties; State law (Public Resources Code) defines CDI as solid waste; Mr. Fishback is disposing solid waste on his properties; and Mr. Fishback does not have a solid waste facility permit for his solid waste disposal operation.

Because EHD previously addressed its determination that CDI is solid waste, and activities, operations, and facilities that dispose solid waste are required to obtain a permit, this brief will focus on the following arguments:

- I. Solid waste disposal activities on Mr. Fishback's properties are governed by California Code of Regulations, Title 14, (14 CCR) Article 5.95
- II. 14 CCR, Article 5.9 does not apply to CDI disposal.
- III. Local ordinances are not in conflict with 14 CCR, Article 5.95
- IV. The approved Hillside Erosion Control Plan (HECO) does not apply to previous fill activities on Mr. Fishback's properties
- V. Mr. Fishback's witness testimonies have no relevance to the issuance of the Cease and Desist Order .

**I. THE SOLID WASTE DISPOSAL OPERATIONS ON MR. FISHBACK'S PROPERTIES ARE GOVERNED BY CALIFORNIA CODE OF REGULATIONS, TITLE 14, ARTICLE 5.95**

At the hearing and in written arguments, there was a lot of discussion about the solid waste diversion goals promulgated by Assembly Bill 939 (AB 939), also known as the California Integrated Waste Management Act of 1989 (Act). EHD previously described in its Reply brief the regulations developed by the California Integrated Waste Management Board (CIWMB) pertaining to the processing, storing, handling, transferring, and disposal of solid wastes that are diverted from municipal solid waste landfills, and the reasons Mr. Fishback's activities are subject to these regulations.

These regulations are found in the California Code of Regulations (CCR), Title 14 and are organized into articles that address activities, operations and facilities that handle all types of solid waste and for other facilities that only handle specific types of solid waste. For example, in Chapter 3.0, Article 5.95 sets forth the minimum requirements for the disposal of CDI, while Articles 5.9 and 6.0 address operations and facilities that transfer and process CDI and other solid wastes.

EHD determined that Mr. Fishback's solid waste disposal operation is subject to Article 5.95, which is titled, "Construction and Demolition Waste and Inert Debris Disposal Regulatory Requirements."

Article 5.95 was developed and implemented by the CIWMB to promote the diversion of CDI away from municipal landfills under prescribed conditions and is compatible with

State diversion goals. In fact, the purpose of Article 5.95 is to establish minimum standards so that CDI can be diverted from municipal landfills in a manner protective of public health, safety, and the environment. Article 5.95 Section 17387(b) states:

"This article is adopted pursuant to and for the purposes of implementing the California Integrated Waste Management Act of 1989 (Act) commencing with Section 40000 of the Public Resources Code (PRC), as amended. These regulations should be read together with the Act."

Article 5.95 also provides for the use of CDI in inert debris engineered fill operations. This type of operation requires that the placement of inert debris, including concrete, rubble, bricks, etc, be designed by an engineer to act as a structural element of constructed work and be placed under engineering inspection. This type of activity, known as an engineered fill activity, qualifies for minimal regulatory oversight. However, Mr. Fishback has thus far failed to provide the documentation required to qualify for an engineered fill operation, although this documentation has been requested by EHD on numerous occasions. Therefore, Mr. Fishback's operation is subject to the CDI disposal requirements in Article 5.95 including the required Registration permit.

## **II. ARTICLE 5.9 SECTION 17380 (g) DOES NOT APPLY TO MR. FISHBACK'S OPERATION**

Article 5.9 applies to CDI transfer/processing facilities. Mr. Fishback's operation does not comply with the minimum requirements for a transfer/processing operation or facility, most importantly the minimum storage requirements established in Article 5.9 Sections 17381.1 (d) and 17381.1 (e).

During the hearing and in closing remarks, Mr. Fishback's attorney, Ms. Neiswender, repeatedly pointed to Article 5.9 section 17380 (g) to support Mr. Fishback's argument that he is exempt from permit requirements. However, Article 5.9 Section 17380 (g) is not applicable to Mr. Fishback because he is not operating a CDI transfer/processing facility.

Article 5.95 and Article 5.9 are mutually exclusive, meaning only one applies and compliance with the exemptions and requirements in one does not confer compliance with provisions found in other Articles.

## **III. VENTURA COUNTY LOCAL ORDINANCES ARE NOT IN CONFLICT WITH CALIFORNIA CODE OF REGULATIONS, TITLE 14, ARTICLE 5.95**

EHD enforcement of Article 5.95 with respect to the Fishback operation and the issuance of the cease and desist order are not in conflict with the Ventura County Hillside Erosion Control Ordinance; Ventura County Building Code grading standards; or Ventura County Ordinance No. 4308, nor are these local ordinances in conflict with Article 5.95. Article 5.95, Section 17387(c) states:

"Nothing in this Article limits or restricts the power of any Federal, State or local agency to enforce any provision of law that it is authorized or required to enforce or administer, nor to limit or restrict local governments from promulgating laws which are as strict or stricter than the regulations contained in this Article. However, no local government may promulgate laws which are inconsistent with the provisions of this Article.

Therefore, the Ventura County Hillside Erosion Control Ordinance, Ventura County Building Code grading standards, and Ventura County Ordinance No. 4308 may contain requirements, standards, or provisions that can be applicable to a CDI disposal facility. However, these ordinances do not and cannot exempt a CDI disposal facility from State laws and regulations governing such operations and facilities.

#### **IV. THE HILLSIDE EROSION CONTROL ORDINANCE (HECO) PLAN DOES NOT COVER MR. FISHBACK'S DISPOSAL ACTIVITIES THAT ARE THE SUBJECT OF THE CEASE AND DESIST ORDER**

Ms. Neiswender stated in her opening remarks that the inert materials used by Mr. Fishback "were approved by RCD" and further stated that the utilization of clean fill in hillside stabilization work, "which I would like to remind the hearing officer, is fully permitted by the Resource Conservation District." In her closing remarks, Ms. Neiswender again stated the Hillside Erosion Control Plan (HECO Plan) approved by the Ventura County Resource Conservation District in May or June 2006 pertained to

previously filled/graded areas as well as future work that was scheduled to begin in June 2006.

Ms. Neiswender failed to reveal in her remarks that the HECO Plan submitted with Mr. Fishback's filing brief (Tab 1) Chapter 1, page 3, includes the following comment:

"Previous fill completed on the parcels ASSUMED exemption under the HECO 10% Article 2.011a, which resulted in complaints and a "Cease and Desist" order from the Ventura County Environmental Health Department." (emphasis added)

More importantly, Ms. Neiswender also failed to reveal that Chapter III, Page 1 of the Fishback HECO Plan contains the following statement:

"Engineering plans (stamped and signed) are enclosed reflecting the parcels, drain fields, future fill areas, previous fill areas (NOT A PART OF THIS PLAN) and quantities for each." (emphasis added)

**V. THE TESTIMONY OF MR. FISHBACK'S WITNESSES ON AUGUST 31, 2006, HAD NO RELEVANCE TO THE ISSUANCE OF THE CEASE AND DESIST ORDER**

Mr. Fishback relied on two witnesses to support his argument that he is not disposing of solid waste on his properties. Both witnesses, George Eowen and Kelly Astor, opined that Mr. Fishback's operation should not be subject to State laws and regulations. No



evidence was provided to support this opinion. Moreover, Mr. Eowen admitted in testimony that although he had visited Mr. Fishback's properties, he had not observed any of the activities that are the subject of the cease and desist order. Mr. Astor testified he had never been to Mr. Fishback's properties. Mr. Eowen and Mr. Astor further testified their opinions were based solely on a description of these activities provided by Mr. Fishback. We can only speculate about the accuracy of this description. In testimony on July 20, 2006 and in his filing brief, Mr. Fishback willingly admitted to receiving CDI and using these materials for "erosion control and slope stabilization work." State law and regulations clearly define CDI as solid waste, and disposal as the final deposition of solid waste onto land. As such, Mr. Fishback is disposing solid waste on his properties and is subject to State law and regulations pertaining to these activities.

Kelly Astor also opined that the State Supreme Court case of Waste Management Inc. v. Palm Springs Recycling Center (1994) Cal. 4<sup>th</sup> 478 (Exhibit 15, EHD Reply Brief) should be broadly applied to all solid waste operations, including the handling and disposal of CDI. Mr. Astor provided no evidence to support this opinion.

In fact, EHD enforcement of Article 5.95 with respect to the Fishback operation and the issuance of a cease and desist order to Mr. Fishback do not conflict with the California Supreme Court's decision in this case. Waste Management Inc. v. Palm Springs Recycling Center is discussed in detail in the EHD Reply brief. In summary, this case involved a dispute between a city's franchise solid waste collection company and a local

recycling business. The case had nothing to do with the ultimate disposal of the materials subject to the court case but rather which of these businesses had a legal right to these materials once they were discarded. Mr. Fishback's operation is not a city solid waste collection company nor is he operating a local recycling business. Furthermore, the cease and desist order issued to Mr. Fishback concerns his operation of an unpermitted solid waste disposal facility and does not apply to the various trucking companies and haulers that have been collecting construction and demolition wastes and inert debris and delivering these wastes to Mr. Fishback's properties.

## **VI. CONCLUSION**

EHD presented evidence that Mr. Fishback accepted solid waste from contractors and haulers, he disposed this solid waste on his property, and he does not have a permit to operate a solid waste disposal facility as required by State law and regulations. As a result of these activities, EHD acting in its capacity as the LEA, issued a cease and desist order to Mr. Fishback, pursuant to the Public Resources Code section 44002(b). Mr. Fishback exercised his appeal rights and requested a hearing. Now that this hearing has concluded, EHD requests that the cease and desist order issued to Mr. Fishback be upheld.

September 22, 2006

**NOTICE OF DECISION**

Wayne Fishback  
3106 Calusa Avenue  
Simi Valley, CA 93063

You are hereby notified that on September 22, 2006 a decision was made in the matter of your appeal of a Cease and Desist Order issued by the Ventura County Local Enforcement Agency (dated May 11, 2006) for alleged violations of Public Resources Code Sections 44001 and 44002(a).

**Issues:**

When construction and demolition and inert debris from (CDI) are used for the purpose of hillside erosion control is it solid waste? If so, is the property owner required to obtain a solid waste facility permit?

**Findings of Fact:**

1. Beginning In March 2005, Mr. Fishback allowed material from construction sites (dirt, stucco, brick, fully cured concrete and asphalt) to be deposited on property he owns or controls in the North American Cutoff Road area of unincorporated Ventura County.
2. Ventura County Environmental Health Department (EHD) has been designated as the Local Enforcement Agency (LEA) by the Ventura County Board of Supervisors.

**Discussion:**

The Public Resources Code (Section 40191(a)) defines solid waste as "all putrescible and nonputrescible solid, semisolid, and liquid wastes, including garbage, trash, refuse, paper, rubbish, ashes, industrial wastes, **demolition and construction wastes**, abandoned vehicles and parts thereof, discarded home and industrial appliances, dewatered, treated or chemically fixed sewage sludge which is not hazardous waste, and other discarded solid and semisolid wastes" (emphasis added). Construction and demolition and inert debris are specific types of solid waste.

Mr. Fishback contends that he is reusing, recycling or diverting construction and demolition and inert debris (CDI) from the waste stream for hillside stabilization on his property therefore it is not solid waste. The Natural Resources Code (CCR Title 14, Division 7, Chapter 3, Article 5.9, Section 17381) defines "separated for reuse" as materials, including commingled recyclables, that have been separated or kept separate from the solid waste stream for the purpose of additional sorting or processing those materials for recycling or reuse in order to return them to the economic mainstream in the form of raw material for new, reused, or reconstituted products which meet the quality standards necessary to be used in the marketplace, and includes materials that have been source separated. The Public Resources Code (Section 40180) defines "recycle" as the process of collecting, sorting, cleansing, treating, and reconstituting materials that would otherwise become solid waste, and returning them to the economic mainstream in the form of raw material for new, reused, or reconstituted products which meet the quality standards necessary to be used in the marketplace. As these materials are not being returned to the economic mainstream I don't find that the use of CDI for hillside stabilization to be reuse or recycling as defined in statute. Natural Resources Code (CCR Title 14, Division 7, Chapter 3) Article 5.95 governs the disposal of solid waste (CDI).

The primary issue settled in the Waste Management of the Desert vs. Palm Springs Recycling Center case was whether exclusive franchise agreements between cities and waste haulers permitted by the California Integrated Waste Management Act of 1989 prohibited the sale of recyclable materials by their owner to someone other than the exclusive franchisee. The meaning the appellant in the Fishback matter wants to ascribe to the Waste Management case is that something is not waste until the person who possesses it discards it with the intention of it going to a landfill. The CDI going to the Fishback property is not recycled or reused material by definition and therefore is solid waste.

If utilizing solid waste (CDI) for hillside stabilization is not reuse or recycling, is it disposal? The Natural Resources Code (CCR Title 14, Division 7, Chapter 3, Article 5.95, Section 17388) defines "disposal" as "the final deposition of C&D waste or inert debris on land". I find this definition to most closely fits the facts in this matter and that Mr. Fishback is disposing of solid waste on his property.

Mr. Fishback claims to be exempt from Solid Waste Disposal Permit requirements based on Natural Resources Code (Title 14, Division 7, Chapter 3, Article 5.9) Section 17380(g): "This article does not apply to persons who generate C&D debris or inert debris in the course of carrying out construction, remodeling, repair, demolition or deconstruction of buildings, roads and other structures (collectively, "construction work") at the site of the construction work or to persons who own the land, buildings and other structures that are the object of the construction work, provided that such persons do not accept at the site any C&D debris or inert debris that is used in the construction work, to remain on the site of the construction work after the construction is completed. For example,

public works agencies constructing roads and bridges, road repair, airport runway construction, bridge and roadway work, levee work, flood control work, or landslide debris cleanup, and public or private contractors demolishing or constructing buildings are not subject to these regulations during the course of the construction work." This portion of the statute applies only to transfer and processing activities as further defined in NRC Section 17381.1 (d) and (e). These materials were not brought to the Fishback property for further transfer or processing, rather are there for final deposition. Thus their deposition is governed by NRC (CCR Title 14, Division 7, Chapter 3) Article 5.95.

The requirement to be permitted as a Solid Waste Disposal facility does not conflict with the HECO (Hillside Erosion Control Ordinance). Mr. Fishback can continue to accept CDI at the subject property for the purpose of hillside stabilization provided he obtains a Solid Waste Disposal Permit from the LEA. Complying with the HECO plan and the Public Resources Code requirements for Solid Waste Disposal Permitting does not present any statutory conflicts, they are not mutually exclusive.

While the disparate treatment argument is not relevant to my ruling in this matter, Public Resources Code Section 44307 states "The enforcement agency shall also hold a hearing upon a petition to the enforcement agency from any person requesting the enforcement agency to review an alleged failure of the agency to act as required by law or regulation. A hearing shall be held in accordance with the procedures specified in Section 44310." Mr. Fishback has recourse if he feels the LEA has failed to act consistently with respect the application of Solid Waste Disposal Permit statutes to other matters.

**Decision and Right to Appeal:**

My decision is to uphold the Cease and Desist Order issued to Wayne Fishback by the LEA on May 11, 2006. This decision may be appealed to the Superior Court by filing a writ of mandate pursuant to section 1094.5 of the Code of Civil Procedure. Any such petition shall be filed with the court no later than thirty (30) days or the appeal shall be barred. A writ of mandate proceeding shall be the aggrieved person's exclusive appellate remedy.

  
Jim Delperdang  
Hearing Officer